IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

LON ALTERMAN, Plaintiff, vs. BARNSTEAD THERMOLYNE CORPORATION and JOHN MEEK, Defendants.	No. C04-1039 JAJ **ORDER**

This matter comes before the court pursuant to the defendants' November 1, 2005, motion for summary judgment (docket number 28). The parties have consented to the exercise of jurisdiction by the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(c). The defendants' motion for summary judgment is denied for the reasons set forth below.

Plaintiff Dr. Lon Alterman alleges that he was discriminated against, harassed, and discharged in retaliation by his former employer, defendant Barnstead Thermolyne Corporation (Barnstead) and its named employee, John Meek, because of his Jewish faith. Plaintiff's claims are based on his national origin and religion.

Barnstead claims that Dr. Alterman's termination was the result of performance deficiencies in his work. Accordingly, Barnstead moves for summary judgment, asserting: (1) Dr. Alterman has failed to show evidence of discrimination, harassment, and retaliation; (2) Dr. Alterman has failed to prove a prima facie case of discrimination, harassment, and retaliation; (3) Barnstead had a legitimate, non-discriminatory reason for terminating Dr. Alterman's employment; and (4) Dr. Alterman has failed to prove that Barnstead's asserted reasons for its termination of Dr. Alterman's employment were pretextual.

Dr. Alterman resists Barnstead's motion, arguing that genuine issues of material fact exist on all counts and that the case should go to trial. Specifically, Dr. Alterman claims to have produced both direct and indirect evidence demonstrating that he was discriminated against because he is Jewish. According to Dr. Alterman, defendant John Meek made a comment about a Barnstead distributer and his "Jewish friends," in a derogatory tone, during Meek's first private meeting with Alterman, and then made intermittent "Jewish friends" remarks over the next 15 months, often conjoining it with hints and suggestions that Alterman find another position with another company or take a demotion. Mr. Meek knew that Dr. Alterman was Jewish. These comments, Dr. Alterman argues, coupled with a constant barrage of unwarranted criticism, conflicting orders, false accusations, restrictions on business travel, and the papering of Dr. Alterman's employment file, (none of which happened to Barnstead's non-Jewish employees), constitute direct evidence of illegal discrimination. Alternatively, Dr. Alterman argues that this evidence creates a jury question under the indirect burden-shifting model of proof. Dr. Alterman further argues that the timing and the frequency of the above-mentioned actions create a jury question on his harassment and retaliation claims.

A. THE SUMMARY JUDGMENT STANDARD

A motion for summary judgment may be granted only if, after examining all of the evidence in a light most favorable to the nonmoving party, the court finds that no genuine issues of material fact exist and that the moving party is entitled to a judgment as a matter of law. Kegel v. Runnels, 793 F.2d 924, 926 (8th Cir. 1986); Fed. R. Civ. P. 56(c). Once the movant has properly supported his motion, the nonmovant "may not rest upon the mere allegations or denials of [its] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). "To preclude the entry of summary judgment, the nonmovant must show that, on an element essential to [its] case and on which it will bear the burden of proof at trial, there are genuine issues of

material fact." Noll v. Petrovsky, 828 F.2d 461, 462 (8th Cir. 1987) (citing Celotex Corp. v. Catrett, 477 U.S. 317 (1986)). Although "direct proof is not required to create a jury question, . . . to avoid summary judgment, 'the facts and circumstances relied upon must attain the dignity of substantial evidence and must not be such as merely to create a suspicion.'" Metge v. Baehler, 762 F.2d 621, 625 (8th Cir. 1985) (quoting Impro Prod., Inc. v. Herrick, 715 F.2d 1267, 1272 (8th Cir. 1983)).

The nonmoving party is entitled to all reasonable inferences that can be drawn from the evidence without resort to speculation. Sprenger v. Fed. Home Loan Bank of Des Moines, 253 F.3d 1106, 1110 (8th Cir. 2001). The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. Id. Although we have stated that summary judgment "is disfavored in employment discrimination cases, as such cases are 'inherently fact-based,'" Simpson v. Des Moines Water Works, 425 F.3d 538, 542 (8th Cir. 2005) (quoting Mayer v. Nextel West Corp., 318 F.3d 803, 806 (8th Cir. 2003)), summary judgment is proper when a plaintiff fails to establish a factual dispute on an essential element of his case. Helfter v. UPS, Inc., 115 F.3d 613, 615–16 (8th Cir. 1997).

B. STATEMENT OF MATERIAL FACTS[1]

Barnstead designs and manufactures labor saving laboratory products including, but not limited to, laboratory water systems, sterilizers, stirring hot plates, shakers, incubators, heating mangles, melting point apparatus, ovens, and cryogenic storage systems. Dr. Alterman was hired by Barnstead on June 5, 2000, as a Project Manager within Barnstead's marketing department after spending the previous twenty years as a college professor. Dr. Alterman's experience and knowledge relating to

[1] When disputed, the facts are taken in a light most favorable to Dr. Alterman as the non-moving party.

Spectrophotometers and Fluorometers was a factor in the decision to hire him as a Project Manager as these products would fall under his responsibilities.

At Barnstead, Dr. Alterman was responsible for developing, promoting, and marketing certain Barnstead products that were assigned to him, such as the Cimarec and Super Nuova hotplate lines, spectrophotometers, fluorometers, and cryogenics shipping and storage systems. Dr. Alterman was also required to work with other Barnstead departments, including Engineering, Field Sales, and Customer Service, to facilitate the promotion and launch of his assigned products. For example, Dr. Alterman was expected to work with the Engineering Department to develop new products and improve existing products within his assigned responsibility. Dr. Alterman was expected to work with the Finance Department with respect to the sales tracking and the expenses and forecasts associated with his assigned products. Dr. Alterman also was expected to work with the Customer Service Department to ensure that the technical needs and concerns of Barnstead's customers were timely addressed, although John Meek ordered the entire department to stop these activities because they were low priority. Dr. Alterman was expected to work with the Manufacturing Department to resolve quality control issues with his assigned products. With respect to his involvement with the Field Sales Department, Dr. Alterman was responsible for training the sales organization concerning the specifics of his assigned products and working with them to promote and launch these products. Dr. Alterman worked with the Marketing Communications Department to fine tune catalogs and other materials.

Ms. Shawn Vera, Barnstead's Distribution Marketing Manager, was Dr. Alterman's direct supervisor when he was first employed by Barnstead. Ms. Vera has testified that she recognized that Dr. Alterman was on a "learning curve" during this time as Dr. Alterman had spent the prior 20 years as a professor. Shortly thereafter, Mr. Richard Passanisi, Ms. Vera's colleague, became Dr. Alterman's direct supervisor for approximately one year. During this period, Barnstead's Marketing Department was

managed by Ms. Vera, Mr. Passanisi, and Mr. Ken Murray. In early 2002, due to another shift of responsibilities in Barnstead's marketing department, Ms. Vera once again became Dr. Alterman's direct supervisor.

In May of 2002, Mr. John Meek was hired by Barnstead as Vice President of Marketing. Mr. Meek took over Ms. Vera's employee supervision duties in the late summer or early fall of 2002. Mr. Meek became Dr. Alterman's direct supervisor at that time. However, Mr. Meek continued to seek Ms. Vera's input regarding Dr. Alterman's job performance. During this period, Mr. Meek asked Ms. Vera to prepare an outline of the positive and negative aspects of Dr. Alterman's job performance, including criticisms thereof.

Dr. Alterman, Mr. Meek, and Ms. Vera met on December 13, 2002, to discuss Dr. Alterman's job performance. Dr. Alterman was provided a copy of the performance outline Ms. Vera had completed. The outline noted various positive and negative aspects of Dr. Alterman's job performance, as determined by Ms. Vera and Mr. Meek. At the conclusion of the meeting, Dr. Alterman was provided a set of specific objectives he was to complete by the end of 2002.

On October 9, 2003, Mr. Meek and Ms. Vera again met with Dr. Alterman to review his job performance. During the meeting, Mr. Meek and Ms. Vera confronted Dr. Alterman with what they felt were continued deficiencies in his job performance as a Project Manager. Mr. Meek, in turn, offered Dr. Alterman a new position as a Sales Specialist for the Turner Spectrophotometer and Fluorometer product lines. Mr. Meek asked Dr. Alterman to consider the offer and make a decision by October 13, 2003. Dr. Alterman failed to respond to Mr. Meek's offer by October 13.

On October 14, 2003, Mr. Meek contacted Dr. Alterman about the Sales Specialist offer. Dr. Alterman expressed reservations about the offer, as he considered it a demotion from his current position as product manager. Dr. Alterman also confronted Mr. Meek about various remarks Mr. Meek had made since May 2002 that he felt were anti-Semitic.

In response, Mr. Meek denied being a bigot, but responded to Dr. Alterman's complaint that he made comments to the effect that Jews were untrustworthy and somehow different from other business associates with the statement, "I may have said that." Mr. Meek also said that he was not bigoted because he has two Jewish brothers-in law, and claimed that he could not be bigoted because he is a Lutheran. Mr. Meek told Dr. Alterman that he intended to report their conversation to Barnstead's Human Resources Department.

Following his conversation with Dr. Alterman on October 14, 2003, Mr. Meek contacted Ms. Lynn Osterhaus, Barnstead's Vice President of Human Resources, regarding Dr. Alterman's complaint. After speaking with Mr. Meek, Ms. Osterhaus met with Dr. Alterman on October 20, 2003 about Mr. Meek's alleged behavior and conducted an investigation into the matter. Dr. Alterman told Ms. Osterhaus that Mr. Meek had referred to "Arnie Schedlow and his Jewish friends," or used the term "Jewish friends," on at least nine different occasions since May 2002. Eight of the remarks occurred during private meetings between Mr. Meek and Dr. Alterman; one occurred during a Marketing Department meeting. After speaking with Mr. Meek about the matter, Ms. Osterhaus concluded that Dr. Alterman had taken the comments out of context. Mr. Meek was advised that such comments were unacceptable and that any retaliation against Dr. Alterman was prohibited.

Ms. Osterhaus contacted Dr. Alterman by telephone in January of 2004 to inquire if Mr. Meek's comments had continued. Dr. Alterman reported that the comments had ceased and described his relationship with Mr. Meek since October 2003 as "cordial." Dr. Alterman did not make any further complaints concerning Mr. Meek to Ms. Osterhaus for the remainder of his employment at Barnstead.

Mr. Meek and Ms. Vera met with Dr. Alterman on February 23, 2004, to review his performance evaluation for the previous year. The evaluation stated that Dr. Alterman's work during the previous year was "unacceptable." As a result, Mr. Meek placed Dr. Alterman on a 90-day performance improvement plan. The performance

improvement plan identified a number of short-term objectives to be accomplished by Dr. Alterman during the 90-day period and provided for weekly progress reviews of Dr. Alterman's performance. Mr. Meek and Ms. Vera were satisfied with Dr. Alterman's performance during the first 45-day period. Mr. Meek and Ms. Vera cited deficiencies in Dr. Alterman's work performance during the second 45-day period when they recommended Dr. Alterman's termination. Barnstead terminated Dr. Alterman's employment on June 8, 2004.

C. CONCLUSIONS OF LAW

1. Discrimination

The United States Court of Appeals for the Eighth Circuit has set forth two ways that a plaintiff can survive a motion for summary judgment by a defendant in an employment discrimination case. First, the plaintiff employee can "produce direct evidence of discrimination, that is 'evidence showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder than an illegitimate criterion actually motivated the adverse employment action.'" Russell v. City of Kansas City, 414 F.3d 863, 866 (8th Cir. 2005) (quoting Griffith v. City of Des Moines, 387 F.3d 733, 735–36 (8th Cir. 2004)). "Direct" evidence "refers to the causal strength of the proof, not whether it is 'circumstantial' evidence." Griffith, 387 F.3d at 736. Thus, "direct" evidence is evidence "that clearly points to the presence of an illegal motive." See id.

If the plaintiff employee does not or cannot produce direct evidence of the alleged discrimination, the employee can still survive summary judgment by "'creating the requisite inference of unlawful discrimination through the familiar three-step burden shifting analysis originating in McDonnell Douglas Corp. v. Green' (citation omitted)." Id. at 866–67 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)). Under the McDonnell Douglas burden-shifting analysis, to survive a defense summary judgment motion, the plaintiff employee must establish a prima facie case of discrimination, the

defendant movant must then articulate "a legitimate nondiscriminatory reason for its adverse employment action," and then the employee must counter the movant's reasons for termination "with a sufficient showing that [the movant's] stated reason is merely a pretext for unlawful intentional discrimination." Id. at 867–68; Simpson v. Des Moines Water Works, 425 F.3d 538, 541 (8th Cir. 2005). To establish a prima facie case of discrimination based on circumstantial evidence, the plaintiff must show that "(1) []he is a member of a protected class; (2) []he was qualified for her position and performed [his] duties adequately; and (3) []he suffered an adverse employment action under circumstances that would permit the court to infer that unlawful discrimination had been at work." Habib v. Nationsbank, 279 F.3d 563, 566 (8th Cir. 2001); Simpson, 425 F.3d at 541. However, "[a] plaintiff with strong (direct) evidence that illegal discrimination motivated the employer's adverse action does not need the three-part McDonnell Douglas analysis to get to the jury, regardless of whether his strong evidence is circumstantial." Griffith, 387 F.3d at 736.

2. Harassment

To prevail on his claim of national origin harassment, Dr. Alterman must establish that: "(1) he is a member of a protected class; (2) unwelcome harassment occurred; (3) there is a causal nexus between the harassment and his protected-group status; (4) the harassment affected a term, condition, or privilege of employment; and (5) [the defendants] knew or should have known of the harassment and failed to take prompt and effective remedial action." Hannoon v. Fawn Eng'g Corp., 324 F.3d 1041, 1048 (8th Cir. 2003); Robinson v. Valmont Indus., 238 F.3d 1045, 1047 (8th Cir. 2001). Further, "[t]he harassment must be both subjectively offensive to the employee and objectively offensive such that a reasonable person would consider it to be hostile or abusive." Turner v. Gonzales, 421 F.3d 688, 695 (8th Cir. 2005); Williams v. Mo. Dep't of Mental Health, 407 F.3d 972, 975 (8th Cir. 2005).

3. Retaliation

Title VII makes it unlawful for an employer to retaliate against an employee who engages in a protected activity, which can either be opposing an act of discrimination made unlawful by Title VII, or by participating in an investigation under Title VII. Hunt v. Nebraska Pub. Power Dist., 282 F.3d 1021, 1028 (8th Cir. 2002). "The elements of a prima facie case of retaliatory discrimination are: (1) the employee engaged in activity protected under Title VII; (2) an adverse employment action was taken against [him]; and (3) there was a causal connection between the two." Turner, 421 F.3d at 695-96. Once a prima facie case has been established, the burden shifts "back to the defendant to articulate a legitimate, nondiscriminatory reason for its actions, and then shifts back to the plaintiff to show that the defendant's reason was pretextual. Id. At 696. "A plaintiff can establish a causal connection between his complaints and an adverse action through circumstantial evidence, such as the timing of the two events." Generally, however, a temporal connection alone is not sufficient to establish a causal connection." Eliserio v. USA, Local 310, 398 F.3d 1071, 1079 (8th Cir. 2005).

D. ANALYSIS

Dr. Alterman alleges his relationship with Mr. Meek was affected by Mr. Meek's animus towards Dr. Alterman's Jewish faith. Dr. Alterman claims that Mr. Meek presented a hostile attitude towards him from the beginning of Mr. Meek's tenure with Barnstead, that the hostility manifested in the above referenced remarks Dr. Alterman felt were anti-Semitic, and that upon lodging a formal complaint of Mr. Meek's behavior, Dr. Alterman was subsequently terminated.

1. Discrimination

Assuming Mr. Meek did make the anti-Semitic comments, as the court must when considering a summary judgment motion, the comments do not constitute direct evidence of discrimination. Although clearly inappropriate and certainly odd, the comments were

not specifically linked to Dr. Alterman's termination. See Clearwater v. Independent Sch. Dist. No. 166, 231 F.3d 1122, 1126 (8th Cir. 2000) (finding comments toward Native Americans about pitching a tend and "scrub Indian ponies" were not "sufficiently related to the adverse employment action in question" to constitute direct evidence of discriminatory motive); Simmons v. Oce-USA, Inc., 174 F.3d 913, 916 (8th Cir. 1999) (holding racial slurs made by decision-maker two years prior to plaintiff's termination were not direct evidence of discrimination); Walton v. McDonnell Douglas Corp., 167 F.3d 423, 426-28 (8th Cir. 1999) (holding reference to employees as "kids" two years prior to adverse employment action was not direct evidence of discrimination); Buckholz v. Rockwell Int'l Corp., 120 F.3d 146 (8th Cir. 1997) (holding hiring supervisor's comment that the "yong kids"he hired "sure were sharp" did not show a specific link between discriminatory animus and decision not to hire applicant). As such, Dr. Alterman's discrimination claim will be analyzed under the three-prong burden shifting standard.

First, Dr. Alterman is undeniably a member of a protected class. Viewing the evidence in a light most favorable to Dr. Alterman, the court finds that he has proffered evidence showing that he was qualified for his job and performed duties adequately. A genuine issue of material fact exists here as a reasonable jury could return a verdict on this issue for either party, depending on what witnesses are deemed credible. Austin v. Minnesota Min. & Mfg. Co., 193 F.3d 992, 995 (8th Cir. 1999). Finally, the court finds that Dr. Alterman's termination occurred under circumstances that would permit a fact finder to infer that unlawful discrimination had been at work. Although disputed by the defendants, Dr. Alterman has produced sufficient evidence, including Mr. Meek's (an undisputed decisionmaker) "Jewish" comments and stories that would permit a jury to find that he was discriminated against due to his Jewish faith. Fisher v. Pharmacia & Upjohn, 225 F.3d 915, 919 (8th Cir. 2000) (finding stray discriminatory remarks constitute circumstantial evidence that, when considered together with other evidence, may give rise to a reasonable inference of discrimination). Dr. Alterman has also provided evidence that his performance at Barnstead was deemed acceptable until Mr. Meek became his boss, that

he was generally viewed as a valuable employee and good worker by his co-workers and various clients, that he was Barnstead's only Jewish employee during the relevant time frame, that Mr. Meek was rude and discourteous to Dr. Alterman, that Dr. Alterman was judged by different and more stringent performance standards that non-Jewish employees, that Mr. Meek gave inconsistent and conflicting instruction to Dr. Alterman, and then criticized Dr. Alterman's response to the instructions, and that Dr. Alterman was criticized and ultimately terminated (in part at least) for his alleged failure to meet deadlines, while his peers testified that the environment at Barnstead was low stress, laid back, and deadlines were not emphasized. For summary judgment purposes, Dr. Alterman has established a prima facie case of discrimination.

With respect to the second prong, the court finds that the defendants have articulated a legitimate, non-discriminatory reason for Dr. Alterman's termination, i.e., poor performance. And, as set forth above, the Dr. Alterman has demonstrated a genuine issue of material fact that defendants' stated reason is pretext for unlawful discrimination. This is especially true considering the alleged irregularities in Barnstead's investigation of Dr. Alterman's internal complaint, i.e., not interviewing all potential witnesses to Mr. Meek's anti-Semitic comments, having Mr. Meek himself talk to potential witnesses, considering Dr. Alterman's replacement when discussing the investigation. Defendants' motion for summary judgment on Dr. Alterman's discrimination claim is denied.

2. Harassment

Dr. Alterman is a member of a protected class. During Mr. Meek's supervision over Dr. Alterman, Dr. Alterman was subjected to nine different "Jewish" comments by Mr. Meek, which Dr. Alterman perceived as negative, as well as constant criticism and rude behavior. The repeated references to Jewish people at least creates a factual issue as to the causal nexus between the harassment and his protected-group status. To the extent that the harassment consisted of Mr. Meek giving conflicting instructions and then criticizing Dr. Alterman for failing to comply with his instructions, and the impact that Mr. Meek's constant criticism had on Dr. Alterman's job performance and/or how he was

perceived by his peers or customers, there again exists a fact issue as to whether the harassment affected a term, condition, or privilege of Dr. Alterman's employment. This is especially true in light of Dr. Alterman's allegations that his business travel and opportunities were restricted whereas non-Jewish employees were not so restricted. Finally, the defendants undeniably became aware of the harassment in October 2003 when HR was notified. If Dr. Alterman's evidence is to believed, defendant's response to his complaint was to immediately begin preparing for his termination and replacement. Defendants' motion for summary judgment on Dr. Alterman's harassment claim is denied.

3. Retaliation

It is undisputed that Dr. Alterman complaint regarding Mr. Meek's allegedly discriminatory and hostile behavior in occurred in October 2003. Dr. Alterman's employment with Barnstead was terminated in June 2004. While the temporal proximity is not overwhelming in this case, there is evidence that Barnstead's investigation into Dr. Alterman's complaint was less than thorough or commonsensical. There is also evidence that Dr. Alterman was put on an unattainable Performance Improvement Plan within a few months of his complaint, and that Barnstead discussed the possibility of replacing Dr. Alterman immediately after he made the complaint. Defendants' motion for summary judgment on Dr. Alterman's retaliation claim is denied.

E. CONCLUSION

Upon the foregoing,

IT IS ORDERED, that the defendants' motion for summary judgment (docket number 28) is denied.

February 28, 2006.

JOHN A. JARVEY
Magistrate Judge
UNITED STATES DISTRICT COURT